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MERCURY SECURITIES SDN BHD & ANOR v. CONCRETE PARADE SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN J
[ORIGINATING SUMMONS NO: WA-24NCC-345-06-2019]
B 28 NOVEMBER 2019

COMPANY LAW: *Meeting – Extraordinary general meeting – Whether shareholders' circular contained full and honest disclosure – Whether breach of duty to make full and fair disclosure rendered transaction invalid – Whether rendered* C *resolution ineffective – Acquisition of goodwill – Whether disclosure on goodwill vague and misleading – Whether results of impairment test by accounting firm material for shareholders to make informed decision – Whether shareholders' circular disclosed status of fulfilment of due diligence condition precedent – Whether nature of assets to be acquired material information – Whether disclosure necessary –* D *Whether non-disclosure of reservations by director constituted breach of duty to make full and fair disclosure – Whether resolutions passed at EGM valid*

The applicants, Mercury Securities Sdn Bhd ('Mercury') and JF Apex Securities Bhd ('JF Apex'), applied for an order of court pursuant to s. 139 of the Capital Markets and Services Act 2007 ('CMSA') to vest the assets and E liabilities of Mercury to JF Apex. JF Apex is a subsidiary of Apex Equity Holdings Bhd ('Apex Equity'), a publicly listed and a licensed stockbroking company. Apex Equity and JF Apex entered into a business merger agreement ('BMA') with Mercury on 18 December 2018 under which Mercury was to transfer its stockbroking business to JF Apex, in F consideration for which it would receive cash and newly issued shares in Apex Equity. The transactions contemplated by the terms of the BMA was approved by Apex Equity in a general meeting on 19 June 2019. The vesting order sought by the applicants had earlier been granted by S Nantha Balan J on 1 July 2019 but was subsequently set aside on the basis that there G had not been full and frank disclosure at the time of the *ex parte* application for the vesting order. The respondents, Concrete Parade Sdn Bhd ('Concrete Parade') and Pinerains Sdn Bhd ('Pinerains'), the shareholders in Apex Equity, intervened in the action. Concrete Parade alleged, among others, that a private placement of shares that was to be undertaken as part of the larger H corporate exercise involving the injection of Mercury's business into JF Apex was oppressive of its rights as shareholder of Apex Equity and that the BMA was void because it contravened s. 223 of the Companies Act 2016. For this purpose, Concrete Parade had commenced a suit ('OS 56'), which however, was dismissed on its merits. Pinerains' application to intervene in the action earlier was dismissed on the ground that Pinerains did not have I the necessary *locus standi* to maintain an objection in the proceedings. This was because, as at the date on which the original vesting order was granted on 1 July 2019, Pinerains had not commenced any action challenging the

relevant resolutions passed at the general meeting of Apex Equity held on 19 June 2019. Its writ action ('Suit 378') was only commenced on 5 July 2019. By Suit 378, Pinerains sought, among others, to challenge the validity of the resolutions passed at the general meeting ('EGM') on 19 June 2019. On 5 August 2019, Pinerains made a fresh application to intervene in the present action and the gist of Pinerains' complaint was that the shareholders' circular upon which the shareholders' approval was obtained at the general meeting was misleading. The court allowed the intervention application and Suit 378 was withdrawn as both cases gave rise to the same cause of action. Pinerains' contention was that the shareholders' circular upon which the shareholders' approval was obtained in the general meeting was misleading and breached the duty placed on the directors to make full and fair disclosure to the shareholders and as a consequence, the resolution passed by the company in the EGM on 19 June 2019 was void. Pinerains also counterclaimed against Mercury, JF Apex, Apex Equity, Alliance Investment Bank and four directors of Apex Equity. Apex Equity, following the declaration that the resolution passed at the EGM of 19 June 2019 was void, proceeded to convene a fresh EGM on 18 November 2019. On 12 November, Pinerains sought an order from the court to direct the chairman of the EGM to adjourn the meeting pending the appointment by the Securities Commission Malaysia of an independent advisor pursuant to s. 218A of the CMSA. Pinerains also sought the appointment of an independent scrutineer to attend the meeting to oversee the voting process.

Held (allowing application; dismissing counterclaim):

(1) There is a duty imposed on directors to make a full and honest disclosure to the shareholders before they vote in any resolution, *ie*, duty not to mislead. This duty arises both in equity as part of the fiduciary duties of directors as well as an implied duty pursuant to s. 223 of the Companies Act 2016. The duty to make full and honest disclosure in shareholders' circular exists to allow a reasonable shareholder to make an informed decision regarding the transaction and implicitly, there must be a disclosure of material matters. A disclosure that is unintentionally misleading or incomplete would not constitute adequate disclosure and may result in the striking down of an affected resolution. Whether or not the failure to adhere to the applicable standard of disclosure was intentional would have a bearing on liability of the directors. (paras 33 & 34)

(2) A breach of the duty to make full and fair disclosure does not invalidate the transaction itself, but will render the resolution ineffective. The practical consequence is that it would still be open to the shareholders to subsequently approve the transaction provided that there is adequate disclosure of material information at any subsequent general meeting of the company. It also means that, depending on

whether the approval of shareholders has been specified as a condition precedent to the rights and obligations under the transaction, the counterparty may have a right to sue the company for breach if the transaction is not subsequently carried out. The action to set aside a resolution obtained in breach of the duty to make full and fair disclosure to the shareholders can be commenced by any shareholder, whether dissentient or absent. There is no requirement for the interveners to state that they had intervened for the benefit of the shareholders as a whole. (paras 38 & 40)

(3) The transaction was valued in the shareholders' circular based on price/earnings ratio, *ie*, the price paid for the business compared to the earnings generated by the business, expressed as a multiple. Ascribing the purchase price to intangible assets was simply an accounting exercise so that the price paid for the business could be recorded in the financial statements of the Apex Equity. The nature of the disclosure of the goodwill purchased was merely descriptive in nature and not meant to be a precise exercise referring to specifically identifiable items of goodwill. Reading the disclosure in the shareholders' circular as whole, and in the light of the manner in which the circular explained how the purchase price was arrived at, there was no issue with the way in which the goodwill to be acquired was described. (paras 44 & 45)

(4) The information relating to the impairment test carried out by the accounting firm Ferrier Hodgson was not material for the shareholders in order for them to make an informed decision whether or not to approve the proposed transaction. The reference was more likely to impairment for the purposes of price adjustment under the BMA. The risk to the Apex Equity and JF Apex was addressed through the price adjustment mechanism under the BMA, which capped the aggregate risk to RM2.5m. Pinerains did not seek to argue that the risk of the diminution in value of assets of up to RM2.5m in a RM140m transaction was unreasonable. On the other hand, if the issue related to the risk disclosure statement in s. 6.5 of the shareholders' circular and the possibility of impairment in the value of specific intangible assets, then this would be constant risk in all transactions involving the acquisition of goodwill. The contended non-disclosure of the results of the impairment test was a non-issue. (paras 47 & 53-56)

(5) There was nothing in evidence that directly confirmed that the condition precedent relating to the due diligence exercise had been fulfilled. Although there was an omission in the shareholders' circular, the omission did not materially affect the rights of any shareholder. There was no risk that needed to be explained to the shareholders,

because the risk of non-fulfilment of the condition precedent no longer existed as at the date of the extraordinary general meeting. (paras 59 & 60)

(6) It would have made little sense to acquire cash in any business acquisition. The reasons are twofold: (i) the funding costs would almost certainly exceed the interest (or profits, in the case of Syariah-compliant deposits) payable on cash held in a bank. This would be the case regardless of whether the funding is obtained in the form of loan or equity; and (ii) the acquisition of cash would only serve to inflate the transaction value, leading to higher transaction costs (such as stamp duty payable). It was arguable that landed property would not be encompassed in the definition of assets used for revenue generation in the stockbroking business; and the reference to 'immovable' property strongly suggested the contrary conclusion, that real property was in fact part of the assets to be acquired. (paras 62 & 65)

(7) The exclusion of landed property from the asset acquisition was set out in a very oblique and almost opaque manner. The ordinary person in commerce scanning the shareholders' circular would not have been able to make out that the landed property had been excluded from the acquisition. The nature of the assets to be acquired was material information that was necessary to be disclosed in the shareholders' circular in order to allow a reasonable shareholder to make an informed decision whether or not to approve the proposed transaction. The financial statements of Mercury were included in the circular. A reasonable investor may mistakenly assume that all its assets were to be subject to the acquisition. It was only by closely examining the pro-forma balance sheet that the truth will dawn. Certainly, a reasonable investor reading or scanning the circular quickly would not appreciate this fact. The shareholders' circular did not constitute full and fair disclosure to the shareholders, and that as a consequence, the resolution passed was ineffective for the purposes of approving the transaction. (paras 66, 68 & 69)

(8) The Listing Requirements of Bursa Malaysia requires a director who is of the view that the transaction under contemplation was not in the best interests of a listed issuer to state in the shareholders' circular the reasons for his opinion and the factors that he had taken into consideration in forming this opinion. In this case, the director in question had not voted against the transaction or expressed the view that the transaction was not in the best interests of Apex Equity, but merely expressed reservations regarding the pricing. Just because the price was not the best price attainable in the circumstances did not necessarily mean that the transaction would not be in the best interests of Apex Equity, or even that it would be to its detriment. No

A requirement arose under the Listing Requirements to disclose the reservations of the director in the shareholders' circular. No obligation arose under either the common law or under statute for such fact to be disclosed. (para 74)

(9) It was incumbent upon the directors to explain why they had used a particular valuation methodology in arriving at the acquisition price. The transaction was valued using price/earnings ratio, which used earnings as a basis to ascertain the price to be paid. The circular did not, however, explain why price/earnings ratio was used, in contrast to other methods of valuing a business, such as assets or cash flow. A reasonable investor would have required an explanation as to the various valuation methodologies available, and why Apex Equity settled upon price/earnings ratio in order to arrive at the purchase price. This omission meant that there had been inadequate disclosure of the material facts that a reasonable investor would require in order to make an informed decision. (paras 75-78)

(10) Neither Pinerains nor Concrete Parade had voted in favour of the resolution. Thus, they could not claim to have been misled. The only persons who may conceivably claim that they had been misled were the shareholders who had voted in favour of the resolution, but who had come forward to say that, had they known about the matters that were misleading or omitted, they would have voted differently. (para 80)

(11) The requirement for the appointment of an independent advisor was purely one that was prescribed by applicable rules or regulation, and because no specific provision of applicable law, rules or guidelines applied to require the appointment of an independent advisor in the circumstances of the present case, no private right of the shareholder arose against the Apex Equity for its purported failure to appoint such an independent advisor. The contention that the transaction had not been negotiated on an arm's length basis was not proven on the facts. (paras 83 & 84)

(12) Order 15 r. 3 of the Rules of Court 2012 ('ROC') permits counterclaims to be raised in all modes of action against a party other than a plaintiff, including originating summonses. While it is true that the specific provisions in O. 28 relating to originating summonses have supremacy over the more general provisions in O. 15, this is only the case where there is conflict between specific provisions. Thus, while O. 28 r. 7(1) provides for the right of a defendant in an originating summons to raise a counterclaim against the plaintiff, it does not expressly prohibit the raising of a counterclaim against persons other than the plaintiff. It would be entirely proper to turn to

O. 15 r. 3 of the ROC, which are provisions of general application, in order to ascertain whether the defendant in an originating summons may raise a counterclaim against a person who was not the plaintiff in the action. Therefore, the raising of the counterclaim by Pinerains against Apex Equity, Alliance Investment Bank and the fifth to eighth defendants in the counterclaim (being directors in Apex Equity) was not procedurally improper. (paras 94 & 95)

(13) The liability of the directors could not be determined without a trial, because they may well be exonerated depending on their state of knowledge, their personal skill and experience and whether, in the circumstances of this case, they had discharged their responsibility by properly delegating their duty to make full and fair disclosure to Alliance Investment Bank. (para 97)

(14) Pinerain's counterclaim could not be sustained against either Mercury or Alliance Investment Bank. Alliance Investment Bank was appointed by Apex Equity to act as the principal adviser and placement agent in connection with the proposed transaction and thus owed duties to Apex Equity. As a financial advisor to Apex Equity, it would also owe fiduciary duties to Apex Equity. There was no privity between Alliance Investment Bank and Pinerains regarding the role of the former in preparing the shareholders' circular, advising Apex Equity on the financial aspects of the proposed transaction or liaising with the regulatory authorities for the necessary approvals. Thus, Alliance Investment Bank could not have owed any duty in contract to Pinerains. Furthermore, any fiduciary duty on Alliance Investment Bank would have only been owed to Apex Equity, and not to individual shareholders in Apex Equity. The counterclaim against Alliance Investment Bank was dismissed. Mercury would not have owed any duty to Apex Equity or to JF Apex, because it was a mere counterparty to the proposed transaction. (paras 98-102)

(15) The application for an order directing the chairman of the EGM to adjourn the meeting was dismissed. It would be in the interests of the general body of shareholders of Apex Equity for not only there to be an independent scrutineer, but a scrutineer whose independence was beyond reproach. For this reason, a new independent scrutineer was directed to be appointed by Apex Equity. (paras 104 & 105)

Case(s) referred to:

Baillie v. Oriental Telephone [1915] 1 Ch 503 ***(refd)***

Concrete Parade Sdn Bhd v. Apex Equity Holdings Bhd & Ors [2019] 1 LNS 1491 HC ***(refd)***

Darvall v. North Sydney Brick & Tile Co Ltd (1988) 14 ACLR 717 ***(refd)***

Dato' Mohd Tahir Abdul Rahim & Ors v. Sykt Permodalan Kebangsaan Bhd & Ors [1991] 2 CLJ 1155; [1991] 2 CLJ (Rep) 525 HC ***(refd)***

Devereaux Holdings v. Pelsart Resources (No 2) (1985) 9 ACLR 956 ***(refd)***

Fraser v. NRMA Holdings Ltd (1995) 15 ACSR 590 ***(refd)***
In Re Sateras Resources (Malaysia) Bhd [2005] 6 CLJ 194 HC ***(refd)***
John Crowther Group Plc v. Carpets International [1990] BCLC 461 ***(refd)***
Kaye v. Croydon Tramways Company [1989] 1 Ch 359 ***(refd)***
Koperasi Nesa Pelbagai Bhd v. Maika Holdings Bhd & Another Case [2008] 8 CLJ 354 HC ***(refd)***
Pacific Coast Coal Mines v. Arbuthnot [1917] AC 607 ***(refd)***
Re Alabama, New Orleans, Texas and Pacific Junction Railway [1891] 1 Ch 213 ***(refd)***
Re Doman, Long & Company Limited [1934] 1 Ch 635 ***(refd)***
Re NRMA Ltd (2000) 34 ACSR 261 ***(refd)***
Standard Chartered Bank Malaysia Bhd v. Eden Enterprises (M) Bhd [2003] 2 CLJ 671 HC ***(refd)***

Legislation referred to:
Banking and Financial Institutions Act 1989 (repealed), s. 50
Capital Markets and Services Act 2007, ss. 139, 218A
Companies Act 2016, ss. 223, 360
Rules of Court 2012, O. 15 rr. 1, 3, O. 28 r. 7(1), O. 41 r. 5

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For Alliance Investment Bank Bhd - John Mathew & Edward Kuruvilla; M/s Christopher & Lee Ong
For the fifth to seventh defendants in the counterclaim - Kennie Ang & Darren Lai; M/s Ivan Ang Lau & Xuen
For the eighth defendant in the counterclaim - Wong Kah Hui & Ms Ong Jian Nee; M/s KH Wong & Co

Reported by S Barathi

JUDGMENT

Azizul Azmi Adnan J:

Introduction

[1] The applicants in this case, Mercury Securities Sdn Bhd ("Mercury") and JF Apex Securities Berhad ("JF Apex"), applied for an order of court pursuant to s. 139 of the Capital Markets and Services Act 2007 to vest the assets and liabilities of Mercury to JF Apex.

[2] JF Apex is a subsidiary of Apex Equity Holdings Bhd ("Apex Equity"), a publicly listed company. It is also a licensed stockbroking company. Apex Equity and JF Apex entered into a business merger agreement with Mercury on 18 December 2018. Under the terms of this

agreement, Mercury (which is also a licensed stockbroker) was to transfer its stockbroking business to JF Apex, in consideration for which it would receive cash and newly issued shares in Apex Equity.

[3] The transactions contemplated by the terms of the business merger agreement was approved by Apex Equity in general meeting on 19 June 2019.

[4] The vesting order sought by the applicants had earlier been granted by S Nantha Balan J on 1 July 2019. However, His Lordship subsequently set aside this earlier order on 15 July 2019.

[5] The respondents, Concrete Parade Sdn Bhd ("Concrete Parade") and Pinerains Sdn Bhd ("Pinerains"), are shareholders in Apex Equity. They intervened in the action.

[6] Concrete Parade alleged, among others, that a private placement of shares that was to be undertaken as part of the larger corporate exercise involving the injection of Mercury's business into JF Apex was oppressive of its rights as shareholder of Apex Equity and that the business merger agreement was void because it contravened s. 223 of the Companies Act 2016. For this purpose, Concrete Parade had commenced Suit 24NCC-56-02/2019 ("OS 56"). On 7 August 2019, I dismissed this action on its merits[1].

[7] Pinerains had earlier sought to intervene in this present action. S Nantha Balan J found that Pinerains did not have the necessary *locus standi* to maintain an objection in the proceedings. This was because, as at the date on which the original vesting order was granted on 1 July 2019, Pinerains had not commenced any action challenging the relevant resolutions passed at the general meeting of Apex Equity held on 19 June 2019. Its writ action in 22NCC-378-07-2019 ("Suit 378") was only commenced on 5 July 2019.

[8] As mentioned, S Nantha Balan J had set aside the vesting order that was previously granted on 1 July 2019. He did so on the basis that there had not been full and frank disclosure at the time of the *ex parte* application for the vesting order. S Nantha Balan J then transferred the case to this court, which was then hearing Concrete Parade's OS 56.

[9] Suit 378 was also transferred to this court on 31 July 2019. By Suit 378, Pinerains sought, among others, to challenge the validity of the resolutions passed at the general meeting on 19 June 2019.

[10] On 5 August 2019, Pinerains made a fresh application to intervene in the present action. Even though S Nantha Balan J had previously determined that Pinerains lacked *locus standi*, this decision was made on the basis that the vesting order had already been granted by the time Pinerains commenced Suit 387. With the setting aside of the vesting order, it was advanced for Pinerains that this objection regarding lack of *locus standi* no longer applied. I was of the view that to allow the intervention by Pinerains in this present

action while its writ action was afoot would amount to an abuse of process. The court would not permit Pinerains to have two irons in the fire, when the acts complained of in both cases were the same, giving rise to the same claimed causes of action. When this was pointed out to Mr Ranjit, counsel for Pinerains, he undertook that, if the court allowed the intervention application, Suit 378 would be withdrawn. The court allowed the intervention application and Suit 378 was duly withdrawn.

Issues And Summary Of Findings

[11] The premise of the intervention by Concrete Parade was its contentions of oppression in suit OS 56. As I have dismissed its claims in OS 56, I was of the view that the bases for its objections against the application for the vesting order thus no longer existed.

[12] The gist of Pinerains' complaint was that shareholders' circular upon which the shareholders' approval was obtained at the general meeting was misleading. Five reasons were advanced as to why this was the case. I found that one of these reasons was made out, and declared the resolution passed at the general meeting void and ineffective. Each of these reasons are considered at paras. 42 to 74, *post*.

[13] I did not, however, dismiss the entire originating summons, as I was of the view that it would have been open to Apex Equity to convene a fresh extraordinary general meeting to approve the proposed transaction, this time with a shareholders' circular that complied with the applicable standards of disclosure. A discussion on these standards of disclosure and the duty placed upon a company and its directors to ensure adherence to those standards is set out at paras. 22 *et seq., post*.

[14] Pinerains' complaints was substantially the same as those raised in Suit 378. In Suit 378, it had named the following persons as defendants in the action:

(i) Apex Equity;

(ii) JF Apex;

(iii) Alliance Investment Bank Bhd. Alliance Investment Bank was the financial advisor to and placement agent of Apex Equity for the proposed transaction; and

(iv) four directors of Apex Equity (who are the fifth to eighth defendants in the counterclaim in the present case).

[15] When it intervened in this present case, Pinerains sought to maintain its claim against all the defendants in Suit 378 by way of a counterclaim. It also added Mercury as a defendant in the counterclaim.

[16] A point of procedure arose: could Pinerains, as a defendant in an originating summons, validly raise a counterclaim against parties who were not the plaintiffs in the action? I found that it could. The reasons are explained at paras. 88 to 95, *post*. The directors of Apex Equity (the fifth to eighth defendants here) have appealed against my decision on this issue.

[17] As against Mercury and Alliance Investment Bank, I dismissed Pinerains' counterclaim. The reason was that neither of them owed any duty to Pinerains in respect of the disclosures contained in the shareholders' circular. This is explained in further detail at paras. 98 to 102, *post*. Pinerains has appealed against my dismissal of its counterclaims against Mercury and Alliance Investment Bank.

[18] As against the fifth to eighth defendants, I was of the view that I was not able to determine whether they were liable to Pinerains in their capacity as directors of Apex Equity because:

(i) I required further submissions on the point of law whether the duty to ensure that there was full and fair disclosure in shareholders' circulars was a duty that was owed to individual shareholders; and

(ii) in any event, I was of the view that the question of whether or not the directors had breached this duty was not one that could be determined based on affidavit evidence, and therefore *viva voce* testimony ought to be received for this purpose (see paras. 96 and 97, *post*).

[19] Following my decision declaring void and ineffective the resolutions passed at the extraordinary general meeting held on 19 June 2019, Apex Equity reconvened another general meeting on 18 November 2019. Days before this meeting, Pinerains applied for an order, among others, directing the chairman of the meeting to adjourn the meeting because it (Pinerains) had requested the Securities Commission to exercise its statutory powers to appoint an independent advisor in respect of the proposed transaction.

[20] I dismissed this application on the grounds that, among others, no requirement arose for the appointment of an independent advisor. This is explained further at paras. 103 to 106, *post*.

[21] In the following paragraphs, I consider the applicable legal principles arising in this case.

Applicable Legal Principles

Applicable Test For Approving A Vesting Order Pursuant To Section 139 Of The Capital Markets And Services Act 2007

[22] The first issue for consideration was the role of the court in approving an application for a vesting order under s. 139 of the Capital Markets and Services Act 2007. In my judgment, the role of the court in such an application is to ascertain the legality of the transaction, and not its fairness or commercial desirability.

[23] Similar provisions exist in other legislation such as the Financial Services Act 2013 and the Islamic Financial Services Act 2013. The reason for such provisions is to facilitate the transfer of assets and liabilities of businesses in regulated industries such as stockbroking, banking and insurance. While the assets of a company may quite easily be transferred by way of an assignment and the giving of a notice to the obligor (in order to convert the assignment into a legal assignment), the transfer of liabilities is more problematic. Liabilities cannot be assigned, and generally speaking, can only be transferred with the assent of the person to whom the liability was owed. In order to effect a transfer of liabilities by way of contract, a tripartite novation agreement is typically entered into, providing for the release of the original obligor, the assumption of liabilities by the new obligor, and the assent of the person to whom the liabilities were owed. Where what is sought to be transferred are obligations owed to thousands of customers, the use of a purely contractual mechanism will pose obvious challenges, because the assent of each and every customer must first be obtained.

[24] It is for this reason that the law permits transfers of rights and obligations to be effected by way of a court order. Upon the pronouncement of the order by the court, the rights and liabilities would be transferred by operation of law, without the need for the assent of individual customers to be obtained.

[25] The High Court in *Standard Chartered Bank Malaysia Bhd v. Eden Enterprises (M) Bhd*[2] considered the position under s. 50 of the (now repealed) Banking and Financial Institutions Act 1989:

> Any order made by the High Court under s. 50 would be essentially to facilitate or enable the agreement or arrangement approved by the Minister pursuant to ss. 49(1) and 49(7) to be given effect to, and when those sections provide "for the sale, disposal or transfer howsoever of the whole or any part of the business of a licensed institution" (s. 49(1)) to be first submitted to the Minister for his approval and, upon approval being granted with or without modifications, variations or conditions (s. 49(7)), then to apply to the High Court to give effect to the approved agreement or arrangement, the vesting order which is made to facilitate or give effect to the approved agreement or arrangement cannot be impugned (s. 50(3)) as long as it is in conformity with the agreement or arrangement as approved by the Minister. *The only grounds on which the vesting order could conceivably be called into question would be either that it did not conform with the approved agreement or arrangement, or that the approved agreement or arrangement was ultra vires the Act or ultra vires any other law which prevailed over the Act*, consequentially rendering the vesting order null and void. In the absence of any such evidence of the non-conformity of the vesting order with the approved agreement or arrangement in relation to SCB and the plaintiff, as well as in the absence of any such evidence of the approved agreement or arrangement being made *ultra vires* the Act or being

made *ultra vires* any other law which prevailed over the Act, the argument of the learned counsel for the defendant was bound to and did collapse. (emphasis added)

[26] In my view, similar considerations apply under other legislation containing similar provisions for the vesting of assets and liabilities, such as the Capital Markets and Services Act 2007.

[27] Contrast this with the role of the court in approving a scheme or arrangement under s. 360 of the Companies Act 2016, where the court examines, to a limited extent, the fairness of transaction: see *Re NRMA Ltd*[3], applying the *dicta* of Fry LJ in *Re Alabama, New Orleans, Texas and Pacific Junction Railway*[4]. This test has been applied in Malaysia in *In Re Sateras Resources (Malaysia) Bhd*[5].

[28] In *Re Doman, Long & Company Limited*[6] the test to be applied by the court for a scheme of arrangement was expressed to comprise the following two steps:

(i) the court first ascertains compliance with the procedural requirements under the applicable law; and

(ii) then it assesses if the scheme is one that an "intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve".

[29] In making the assessment in the second part of the test above, the court must necessarily be drawing a value judgment on the commercial desirability of the scheme under contemplation. Although it is often said that a court in approving a scheme of arrangement is not exercising commercial judgment, in my view it does so but in a limited sense. This was recognised in *Re NRMA* (*op cit*).

[30] By contrast, in an application for a vesting order under s. 139 of the Capital Markets and Services Act 2007 (as well as under other cognate provisions of law), the fairness of the transaction under contemplation is not a relevant consideration for the court, because it would be for the shareholders to assess its fairness and to approve the transaction accordingly. In a scheme of arrangement, there is usually (but not always) competing interests of creditors, shareholders and contributories to be balanced against each other. Prudential regulation and market integrity issues are addressed by the approval of the regulatory authorities such as Bank Negara Malaysia and the Securities Commission Malaysia. The role of the court is primarily to effect the transfer of rights and obligations by operation of law.

[31] To summarise, the court in an application for a vesting order under s. 139, is concerned with the legality of the transaction. In assessing the legality of the transaction under consideration, the relevant matters include compliance with the terms of approval by the regulatory authorities

(see *Standard Chartered Bank Malaysia Bhd v. Eden Enterprises (M) Bhd (op cit*). It would also include the question of whether shareholder approval has been properly obtained.

Disclosure Standards In Shareholders' Circulars

[32] Having determined the role of the court in an application for vesting order, the next question to be determined was what is the applicable disclosure standards in shareholders' circulars where the approval of the shareholders of a company is sought in a general meeting of the company. Here, in my view, the disclosure standards would be the same in all instances, including where approval of shareholders was being sought for a scheme of arrangement.

[33] The law may be briefly stated as follows. There is a duty imposed on directors to make a full and honest disclosure to the shareholders before they vote in any resolution: *John Crowther Group Plc v. Carpets International*[7]. Put another way, there is a duty not to mislead: *Koperasi Nesa Pelbagai Bhd v. Maika Holdings Bhd & Another Case* [8]. This duty arises both in equity as part of the fiduciary duties of directors (see *Fraser v. NRMA Holdings Ltd*[9]) as well as an implied duty pursuant to s. 223 of the Companies Act 2016.

[34] The duty to make full and honest disclosure in shareholders' circular exists to allow a reasonable shareholder to make an informed decision regarding the transaction: see *Dato' Mohd Tahir Abdul Rahim & Ors v. Sykt Permodalan Kebangsaan Bhd & Ors*[10], applying *Kaye v. Croydon Tramways Company*[11] and *Baillie v. Oriental Telephone*[12]. Implicit in this statement is that there must be a disclosure of material matters. The duty has been variously described as "full and honest disclosure" or "full and fair disclosure". I am of the view that there is no material difference between the two formulations. What is required is that the contents of the circular are complete in all material respects and do not contain any information that is misleading in any material particular. A disclosure that is unintentionally misleading or incomplete would not constitute adequate disclosure and may result in the striking down of an affected resolution. Whether or not the failure to adhere to the applicable standard of disclosure was intentional would have a bearing on liability of the directors.

[35] The information must be presented in a manner that enables a shareholder who scanned or read the document quickly, not as a lawyer, but as an ordinary person in commerce to make an informed decision: *Devereaux Holdings v. Pelsart Resources* (No 2)[13].

[36] In the case of a company listed on Bursa Malaysia, it is no answer to say that there has been a mechanistic compliance with the disclosure requirements contained in the Listing Requirements if there had not been full and fair disclosure.

[37] It will not be necessary for the shareholder seeking to challenge a resolution passed by the company in general meeting to establish that it would have voted differently had adequate disclosure been made. The test, as explained, is whether the information that was not disclosed or disclosed incorrectly was information that a reasonable shareholder would have required in order to make an informed decision whether or not to approve the transaction in question. Thus, if a shareholder alleges that information contained in a shareholders' circular was misleading and that it possessed information regarding the true state of affairs before voting on the resolution, this does not rob the shareholder of *locus standi* to challenge the resolution. Even though the shareholder would not have noted any differently had the correct disclosure been made, what matters are not the actions of the specific shareholder in question, but the collective decision of the body of shareholders.

Consequences Of Breach

[38] If there has been a breach of the duty to make full and fair disclosure, this breach does not invalidate the transaction itself, but will render the resolution ineffective: see *Kaye v. Croydon Tramways Company* (*op cit*), where the Court of Appeal reversed the decision of the trial judge who had held that the transaction was *ultra vires*. The practical consequence is that it would still be open to the shareholders to subsequently approve the transaction provided that there is adequate disclosure of material information at any subsequent general meeting of the company. It also means that, depending on whether the approval of shareholders has been specified as a condition precedent to the rights and obligations under the transaction, the counterparty may have a right to sue the company for breach if the transaction is not subsequently carried out.

[39] The Privy Council in the case of *Pacific Coast Coal Mines v. Arbuthnot*[14] held the transaction in that case to have been *ultra vires*; however this decision can be distinguished because the transaction in that case was validated by a private Act of the Legislature of British Columbia and not by an order of court. Non-compliance with the terms of the private Act rendered the transaction *ultra vires*.

Who Must Commence The Action?

[40] The action to set aside a resolution obtained in breach of the duty to make full and fair disclosure to the shareholders can be commenced by any shareholder, whether dissentient or absent: see *Kaye v. Croydon Tramways Company (op cit)*. In a number of the cases cited in argument, the action was expressed to have been commenced on behalf of all the shareholders in the company concerned. I am of the view that there is no requirement under Malaysian law for the interveners here to state that they had intervened for the benefit of the shareholders as a whole. See for example the case of *Darvall*

v. North Sydney Brick & Tile Co Ltd[15], where the resolution was struck down even though the action did not appear to have been commenced on behalf of all shareholders.

Misleading

[41] Pinerains contended that the shareholders' circular was misleading and breached the duty placed on directors to make full and fair disclosure to the shareholders. As a consequence – it was argued – the resolution passed by the company in general meeting on 19 June 2019 was void. Five reasons were advanced as to how the shareholders' circular purportedly breached the duty to make full and fair disclosure. These are considered in turn in the following paragraphs.

Goodwill

[42] It was advanced for Pinerains that the disclosures in the shareholders' circular relating to goodwill to be purchased under the acquisition under contemplation were vague and misleading. The relevant passages in the shareholders' circular read as follows:

> **2.1.2 Basis and justifications in arriving at the Consideration**
>
> The consideration was arrived at on a "willing buyer-willing seller" basis after taking into consideration the following:-
>
> ...
>
> (ii) The difference between the Consideration and the net value of Assets less Liabilities relating to the Business of RM90 million is represented by mainly the following (which are not reflected In Mercury Securities' Statement of Financial Position):
>
> (a) intangible assets such as the following:
>
> (ai) customer list and customer relationships which include Mercury Securities' entire stockbroking clients' base and **all the clients' monies held in trust under segregated bank accounts** and all securities held in their Central Depository System accounts); and
>
> (aii) contract-based intangible assets (e g. licensing agreements, service contracts, employment contracts and lease agreements). These **may include** all on-going mandates for corporate finance advisory transactions, commissioned dealers' representatives and the entire workforce (comprising of salaried dealers; representatives, corporate finance advisory team, management team and all other supporting staff).
>
> ; **and/or**
>
> (b) goodwill for the respective business segments under the Business.
>
> (emphasis added)

[43] Specifically, it was contended that client's money cannot form part of the assets of Mercury and that the words "may include" and "and/or" at para. (aii) created uncertainty.

[44] The transaction was valued in the shareholders' circular based on price/earnings ratio, ie, the price paid for the business compared to the earnings generated by the business, expressed as a multiple. Two comparables were used, Kenanga Investment Bank Bhd and Apex Equity itself. Thus, in reality, the goodwill figure was simply a balancing sum. Ascribing the purchase price to intangible assets was simply an accounting exercise so that the price paid for the business can be recorded in the financial statements of the Apex Equity. The nature of the disclosure of the goodwill purchased was merely descriptive in nature and not meant to be a precise exercise referring to specifically identifiable items of goodwill. It is in effect saying that, Apex Equity will pay RM140m for this business, only RM50m of which will be attributable to tangible assets net of liabilities. The rest will be a premium paid to Mercury, because based on the price/earnings ratio that Apex Equity has used, this was the price to be paid for a business that generated a given amount of earnings.

[45] There is always the danger of reading the shareholders' circular with the critical eye and giving import to every word used as though it was a legal document drafted with litigation in mind. Reading the disclosure in the shareholders' circular as whole, and in the light of the manner in which the circular explained how the purchase price was arrived at, I saw no issue with the way in which the goodwill to be acquired was described.

[46] The risk of any other approach would be to cause shareholders' circulars to grow into an impenetrable legalistic thicket of words, capable of comprehension only with the assistance of legal advice.

Impairment Of Assets

[47] The second ground of challenge on the disclosures contained in the shareholders' circular related to the purported failure by Apex Equity to provide the results of an impairment test that had been carried out by the accounting firm Ferrier Hodgson. I found that the information relating to this impairment test was not material for the shareholders in order for them to make an informed decision whether or not to approve the proposed transaction.

[48] The following exchange was recorded in the minutes of the extraordinary general meeting:

> Encik Izral raised the following question:
>
> Q41: Was there ever a valuation undertaken for this merger to arrive at the price of RM140.0 million? Where is the valuation?

Mr. Tee replied that there was a valuation undertaken, and directed Encik Izral to page 10, clause 2.1.2 on the basis and justifications in arriving at the consideration. However, Encik Izral said that was not a valuation, and deemed that there was no valuation done.

Mr. Tee explained that apart from clause 2.1.2, AIBB has appointed Ferrier Hodgson MH Corporate Advisory Sdn. Bhd. ("FH"), an investment expert to look at the impairment test for this transaction and to provide impairment advice.

Encik Izral raised the following question:

Q42: Did Ferrier Hodgson provide a report for the impairment exercise?

Q43: Can the preliminary assessment advice be shared with the shareholders?

Mr. Tee said, FH did a preliminary assessment, and AIBB has a copy of the preliminary assessment results. Mr. Tee informed the Meeting that AIBB would need to obtain consent from FH before providing a copy of the preliminary assessment report to the shareholders.

Encik Izral commented that the shareholders have to vote today and no valuation has been done but there was an impairment advice report by FH but does not want to share with the shareholders prior to obtaining consent from FH. Mr. Tee explained that FH is accountable for the said report as it was a reported to the Board.

At this juncture, Dato' Chairman informed the Meeting that the representative from FH, Mr. Lim Litt, is present at the Meeting. Dato' Chairman invited Mr. Lim Litt to come forward to answer the question.

Encik Izral raised the following question to Mr. Lim Litt:

Q44: Where is the impairment exercise advice?

Mr. Lim Litt replied that based on what he has heard, there was no valuation conducted by FH. FH was engaged to do an impairment exercise on the transaction upon the completion date. The purpose of that exercise was for completion audit purpose. Based on the numbers given, FH was asked to provide an indication on the impairment to AIBB so that all advisers can work accordingly on the matter. It is only indicative as the actual impairment exercise can only be done after completion and would be based on certain conditions stipulated in the BMA.

Encik Izral said that the shareholders have been asked to vote but there was no valuation and no impairment exercise as yet. Mr. Lim Litt confirmed no, as it would be based on conditions stipulated. Hence, Encik Izral asked how would it be right for the shareholders to vote for a deal at this price when there is no valuation and no impairment exercise, therefore, unfair to the shareholders.

At this juncture, Mr. Mak interjected by stating that there could be a big misunderstanding about terminology. For the impairment exercise for this deal to see whether the value of certain asset should be brought down

according to whether has been set. Mr. Mak asked Mr. Lim Litt that, when he said that there is no impairment exercise, does that mean no impairment was conducted in the circumstances after FH has made the study and it does not mean that FH did not study.

Mr. Lim Litt confirmed that there was no report as yet. Mr. Tee informed the Meeting that it should be noted that there is no requirement under the Listing Requirement for this transaction. Encik Izral said isn't this a major transaction of RM140.0 million, and AIBB said that the Company need not have a valuation and no impairment exercise as yet. Encik Izral viewed that the shareholders deserve a lot more than this.

Mr. Mak said that there could be a misunderstanding. There would be a valuation but not the kind of valuation that we are used to. Dato' Chairman informed the Meeting that as far as Apex is concerned, AIBB was appointed to be an independent adviser for the deal. AIBB did their own valuation, at least an internal valuation with some assistance from FH. The Board feels that whatever has been presented by AIBB has been discussed by the Board, and felt that it is a fair advice and now presenting the same to the shareholders for voting. If the shareholders agree with Board, the shareholders can vote in Favour, and if the shareholders do not agree, they vote Against it.

[49] The Mr Tee referred to in the extract of the minutes was Mr Tee Kok Wah, a representative of the lead advisor to Apex Equity, Alliance Investment Bank. The meeting was told that the firm of Ferrier Hodgson had been appointed by Alliance Investment Bank to conduct an "impairment test" for the transaction and to provide the impairment advise. Mr Lim Litt referred to in the minutes was a representative of Ferrier Hodgson.

[50] The complaint of Pinerains was that the company was unwilling to share the indicative report regarding the impairment with the shareholders, which left the shareholders unable to make an informed decision on the commercial desirability of the transaction.

[51] The issue of impairment could arise in two circumstances:

(i) first, was the issue of impairment of net assets for the purposes of calculating adjustments to the purchase price pursuant to cl. 3.3 of the business merger agreement; or

(ii) secondly, was the matter of the allocation of the purchase price paid to specific intangible assets, and the impairment of those assets over time, as described in s. 6.5 of the shareholders' circular.

[52] In either case, the question of impairment was not a material consideration that affected or that was capable of affecting the decision of the shareholders whether or not to approve the transaction.

[53] In my view, the reference was more likely to impairment for the purposes of price adjustment under the business merger agreement. The completion auditors that had been appointed by the parties to the business

merger agreement was in fact FHMH Corporate Advisory Sdn Bhd, the company of which Mr Lim Litt is a director. Under cl. 3.3.3 of the business merger agreement, the completion auditors were to apply the accounting policies adopted by Mercury for the purposes of determining the impairment to net assets as at the completion date. In this case, the risk to the Apex Equity and JF Apex is addressed through the price adjustment mechanism under the business merger agreement, which caps the aggregate risk to RM2.5m.

[54] Pinerains did not seek to argue that the risk of the diminution in value of assets of up to RM2.5m in a RM140m transaction was unreasonable in the circumstances.

[55] On the other hand, if the issue related to the risk disclosure statement in s. 6.5 and the possibility of impairment in the value of specific intangible assets, then this would be constant risk in all transactions involving the acquisition of goodwill.

[56] In other words, the contended non-disclosure of the results of the impairment test was a non-issue.

The Due Diligence Point

[57] The business merger agreement was subject to the condition precedent that the results of the legal and financial due diligence exercise over the assets and liabilities to be acquired would be satisfactory to Apex Equity: see cl. 5.1.3 of the business merger agreement. The original due diligence period was specified to expire on 18 February 2019. This date was extended twice, on the second occasion to 18 August 2019 (ie, six months from the original agreed date).

[58] The shareholders' circular did not disclose the status of fulfilment of the due diligence condition precedent. This, according to counsel for Pinerains, was inadequate disclosure. Furthermore, it was argued that JF Apex could not move the court for a vesting order because there was no evidence before the court regarding the fulfilment of the due diligence condition precedent.

[59] There was indeed nothing in evidence that directly confirmed that the condition precedent relating to the due diligence exercise has been fulfilled. Mr Mak for Apex Equity pointed to the following:

(i) the shareholders' circular contained the pro-forma accounts of the merged business. He invited the court to infer that, because the pro-forma accounts had been signed off by the board of Apex Equity, it must necessarily follow that the due diligence condition had been fulfilled sometime before 31 May 2019, which was the date on which the pro-forma accounts were signed by the directors. Now, because the latest practicable date for the shareholders' circular was 15 May 2019,

it follows by inference – according to Mr Mak – that the due diligence condition must have been fulfilled sometime after 15 May 2019, which was why the information relating to its fulfilment was not included in the shareholders' circular;

(ii) the due diligence had been completed according to the Apex Equity (based on the minutes of the extraordinary general meeting); and

(iii) Apex Equity had made an announcement on 2 July 2019 stating that all the conditions precedent for the transaction had been fulfilled, which must have meant that the due diligence condition would have certainly been fulfilled by this date too.

[60] I am of the view that:

(i) there was an omission in the shareholders' circular. There was nothing to prevent Apex Equity from including a statement in its shareholders' circular that the due diligence condition was still outstanding as at the latest practicable date; but

(ii) nonetheless, this omission did not materially affect the rights of any shareholder. If the condition precedent had not been obtained, then the transaction would simply not proceed to completion. If it has been obtained but this information had not been included in the shareholders' circular, then it would not have been of any consequence. There was no risk that needed to be explained to the shareholders, because the risk of non-fulfilment of the condition precedent no longer existed as at the date of the extraordinary general meeting.

Exclusion Of Land Property And Cash And Cash Equivalent

[61] The exclusion of cash, cash-equivalent assets and landed property from the assets to be acquired was only explained in a very oblique manner in the shareholders' circular. According to Pinerains, this was crafted with deliberation to be misleading. It was only by comparing the Mercury balance sheet with the pro-forma balance sheet for the merged entity can it be surmised that there has been an exclusion of these assets.

[62] The first observation that may be made in passing is that it would have made little sense to acquire cash in any business acquisition. The reasons are twofold: firstly, the funding costs would almost certainly exceed the interest (or profits, in the case of Syariah-compliant deposits) payable on cash held in a bank. This would be the case regardless of whether the funding is obtained in the form of loan or equity. Secondly, the acquisition of cash would only serve to inflate the transaction value, leading to higher transaction costs (such as stamp duty payable).

[63] Mr Mak for the applicants suggested that the nature and extent assets to be acquired by JF Apex was explained by the definition of "Assets" in the shareholders' circular, which provided as follows:

A Assets : Assets, properties rights and benefits of every description owed, used, enjoyed and exercised in generating the revenue in connection with the Business, both movable and immovable, tangible and intangible

[64] The contention was that, landed property was not assets used in B generating the revenue of the stockbroking business of Mercury, and hence would be understood to have been excluded from the acquisition.

[65] I was of the view that this argument was specious. Firstly, it was arguable that landed property would not be encompassed in the definition of assets used for revenue generation in the stockbroking business. If, for C example, the landed property housed the building within which the securities dealers' representatives were located, would this not be for the purposes of generating revenue? Secondly, the reference to "immovable" property strongly suggested the contrary conclusion, that real property was in fact part of the assets to be acquired.

D **[66]** In my view, the exclusion of landed property from the asset acquisition was set out in a very oblique and almost opaque manner. The ordinary person in commerce scanning the shareholders' circular would not have been able to make out that the landed property has been excluded from the acquisition.

E **[67]** Was the exclusion material? Did it matter what assets were to be acquired? It was clear from the terms of the business merger agreement that the net assets acquired would have a value of RM50m, subject to a RM2.5m variance. Thus, if the net assets were less than RM47.5m at completion, then the purchase price would have to be reduced accordingly. Similarly, if the F value net assets to be acquired was more than RM52.5m at completion, there would be an upward adjustment to the purchase price. Mr Ranjit for Pinerains nonetheless argued that that the nature of the assets to be acquired did matter, as the acquisition of landed property may have different considerations than, say, depleting assets that would have to be depreciated G over time.

[68] In my judgment, the nature of the assets to be acquired was material information that was necessary to be disclosed in the shareholders' circular in order to allow a reasonable shareholder to make an informed decision whether or not to approve the proposed transaction. The financial statements H of Mercury were included in the circular. A reasonable investor may mistakenly assume that all its assets were to be subject to the acquisition. It was only by closely examining the pro-forma balance sheet that the truth will dawn. Certainly, a reasonable investor reading or scanning the circular quickly would not appreciate this fact.

I

[69] For this reason, I found that the shareholders' circular did not constitute full and fair disclosure to the shareholders, and that as a consequence, the resolution passed was ineffective for the purposes of approving the transaction.

Non-disclosure Of Reservations Expressed By Director Of Apex Equity

[70] One of the directors of Apex Equity had expressed reservations regarding the price paid for Mercury's stockbroking business. Two specific points were raised by this director at a board meeting:

(i) the first was that the price-to-book ratio of the Mercury business to be acquired was 2.8 times, which was much higher than the industry standard;

(ii) secondly, the issue price of the consideration shares was lower than the net tangible asset per share of the Apex Equity shares (but comparable to the market price of the shares).

[71] It was argued that the non-disclosure of these reservations of the director constituted a breach of the duty to make full and fair disclosure.

[72] An objection was raised against the evidence sought to be adduced regarding the reservations that had been raised by the director in question. This director had not himself affirmed an affidavit as to the matters alleged and hence, it was argued, the evidence regarding his reservations ought not be admissible by reason of the proper application of O. 41 r. 5 of the Rules of Court 2012.

[73] I dismissed this objection. The reason was that an affidavit may properly be affirmed by a person who had heard the director expressing his reservations, because the fact in issue was not the truth of the contents of his statements, but rather to establish the fact that the statements had been made.

[74] It was pointed out that the Listing Requirements of Bursa Malaysia requires a director who is of the view that the transaction under contemplation was not in the best interests of a listed issuer to state in the shareholders' circular the reasons for his opinion and the factors that he had taken into consideration in forming this opinion[16]. However, in this case, the director in question had not voted against the transaction or expressed the view that the transaction was not in the best interests of Apex Equity, but merely expressed reservations regarding the pricing. It is one thing to state, "I think we can get a better price for this business", and quite another to state, "this transaction is not in the interests of the company". Just because the price is not the best price attainable in the circumstances does not necessarily mean that the transaction would not be in the best interests of Apex Equity, or even that it would be to its detriment. No requirement arose under the Listing Requirements to disclose the reservations of the director in the shareholders' circular. I am also of view that no obligation arose under either the common law or under statute for such fact to be disclosed.

Valuation Methodology

[75] I was of the view that it was incumbent upon the directors to explain why they had used a particular valuation methodology in arriving at the acquisition price. This however, was not a point that was raised by Pinerains, and hence I did not take it into account in arriving at my decision in this case. The following discussion is included as guidance for future transactions.

[76] In the present case, the transaction was valued using price/earnings ratio, which as its name suggests, uses earnings as a basis to ascertain the price to be paid. The circular does not, however, explain why price/earnings ratio was used, in contrast to other methods of valuing a business, such as assets or cash flow.

[77] Now, I can imagine why earnings were used: this was because stockbroking is not generally regarded as a capital intensive business and is highly scalable, meaning that the same infrastructure employed can support a high volume of business (due to business automation, for example). Therefore asset-based valuation methodologies may not be appropriate. Similarly, a cash-flow based methodology such as discounted cash flow or internal rate of return may not be appropriate where the cash flows are uncertain and dependent on market sentiments. Nonetheless, I am of the view that a reasonable investor would have required an explanation as to the various valuation methodologies available, and why Apex Equity settled upon price/earnings ratio in order to arrive at the purchase price.

[78] This omission meant that there had been inadequate disclosure of the material facts that a reasonable investor would require in order to make an informed decision, but, as explained, because this was not a point that was advanced by any of the parties, I have not taken it into account for the purposes of arriving at my decision in this case.

[79] For the avoidance of doubt, I do not suggest for a moment that Apex Equity was wrong to adopt price/earnings ratio as the basis for its pricing, but an explanation ought to have been included for the benefit of the investors.

Neither Pinerains Nor Concrete Parade Misled

[80] In the course of submissions, the point arose whether Pinerains or Concrete Parade could validly maintain an objection to the resolution passed on the basis of a shareholders' circular that did not comply with the duty of full and fair disclosure. Neither Pinerains nor Concrete Parade had voted in favour of the resolution. Thus, they cannot claim to have been misled. The only persons who may conceivably claim that they had been misled were shareholders who had voted in favour of the resolution, but who have come forward to say that, had they known about the matters that were misleading or omitted, they would have voted differently.

[81] This however, did not matter. As explained at paras. 37 and 38 *ante*, the failure to meet the requisite standard of disclosure meant that the resolution obtained was ineffective.

Transaction Conducted At Less Than Arm's Length Basis

[82] Apex Equity had not appointed an independent advisor for the purposes of the proposed transaction. It was advanced for Pinerains that this fact, together with the surrounding circumstances of the proposed transaction taken in totality, suggested that the transaction was being conducted at less than an arm's length basis.

[83] In my judgment, because the requirement for the appointment of an independent advisor is purely one that is prescribed by applicable rules or regulation, and because no specific provision of applicable law, rules or guidelines applied to require the appointment of an independent advisor in the circumstances of the present case, no private right of the shareholder arose against the Apex Equity for its purported failure to appoint such an independent advisor.

[84] In any event, the contention that the transaction had not been negotiated on an arm's length basis was not proven on the facts.

Res Judicata

[85] Counsel for the applicants raised the argument that Pinerains ought to be prevented by *res judicata* from challenging the contents of the shareholders' circular. This was because, in earlier proceedings where Pinerains had sought to injunct Apex Equity from preventing Pinerains from voting at the extraordinary general meeting, the purported shortcomings of the shareholders' circular had not been raised.

[86] The short – but complete – answer to this argument was simply that the issue of the misleading contents of the shareholders' circular was not relevant to the earlier injunction proceedings.

Counterclaim

[87] Pinerains counterclaimed against Mercury, JF Apex, Apex Equity, Alliance Investment Bank and four directors of Apex Equity.

The Procedural Point

[88] A point of adjectival law was raised by counsel for the fifth to seventh defendants in the counterclaim, counsel for the eighth defendant, as well as by counsel for Mercury. It was argued that a counterclaim may only be raised in an originating summons against the plaintiff or plaintiffs in the originating summons. A counterclaim cannot be made – according to counsel – against persons who were not already parties to the original action.

[89] Reliance was placed on O. 28 r. 7(1) of the Rules of Court 2012, which provides as follows:

> Counterclaim by defendant (O. 28 r. 7)
>
> 7. (1) A defendant to an action begun by originating summons who alleges that he has any claim or is entitled to any relief or remedy **against the plaintiff** in respect of any matter, whenever and however arising, may make a counterclaim in the action in respect of that matter instead of bringing a separate action.
>
> (emphasis added)

[90] Order 28 of the Rules of Court 2012, it will be recalled, provides for the procedures to be followed in originating summonses. The core thrust of the argument raised by counsel was that nothing in O. 28 provides for the ability for a defendant in an originating summons to raise a counterclaim against a person other than the plaintiff.

[91] While O. 28 provides for the procedures to be applied in originating summonses, O. 15 provides for rules relating to causes of action, counterclaims and parties in respect of all modes of action.

[92] That this is so can be seen from O. 15 r. 1, which provides as follows:

> Joinder of causes of action (O. 15 r. 1)
>
> 1. (1) Subject to rule 5(1), a plaintiff may in one action claim relief against the same defendant in respect of more than one cause of action:
>
> (a) if the plaintiff claims, and the defendant is alleged to be liable, in the same capacity in respect of all causes of action;
>
> (b) if the plaintiff claims or the defendant is alleged to be liable in the capacity of executor or administrator of an estate in respect of one or more of the causes of action and in his personal capacity but with reference to the same estate in respect of all the others; or
>
> (c) with the leave of the Court.
>
> (2) An application for leave under this rule shall be made by *ex parte* notice of application supported by affidavit before the issue of **the writ or originating summons** and the affidavit must state the grounds of the application.
>
> (emphasis added)

[93] Order 15 r. 3 provides for the procedures to be followed in counterclaims:

> Counterclaim against additional parties (O. 15 r. 3)
>
> 3. (1) Where a defendant to an action who makes a counterclaim against the plaintiff alleges that any other person (whether or not a party to the action) is liable to him along with the plaintiff in respect of the subject matter of the counterclaim, or claims against such other person any relief

relating to or connected with the original subject matter of the action, then, subject to rule 5(2), he may join that other person as a party against whom the counterclaim is made.

[94] In my considered view, O. 15 r. 3 permits counterclaims to be raised in all modes of action against a party other than a plaintiff, including originating summonses. While it is true that the specific provisions in O. 28 relating to originating summonses have supremacy over the more general provisions in O. 15, this is only the case where there is conflict between specific provisions. Thus, while O. 28 r. 7(1) provides for the right of a defendant in an originating summons to raise a counterclaim against the plaintiff, it does not expressly prohibit the raising of a counterclaim against persons other than the plaintiff. That being the case, it would be entirely proper to turn to O. 15 r. 3, which are provisions of general application, in order to ascertain whether the defendant in an originating summons may raises a counterclaim against a person who was not the plaintiff in the action.

[95] On balance, therefore, I am of the view that the raising of the counterclaim by Pinerains against Apex Equity, Alliance Investment Bank and the fifth to eighth defendants in the counterclaim (being directors in Apex Equity) was not procedurally improper.

Directors

[96] I required further submissions before determining the question of the personal liability of the fifth to eighth defendants in this case, who are the directors of Apex Equity. Specifically, I required counsel to address the point whether the duty to make full and fair disclosure was one that was owed to individual shareholders, and not just to the shareholders collectively. If it was a duty that was only owed to the body of shareholders as a whole, then an individual shareholder would not be entitled to claim in damages upon breach of the duty.

[97] I was also of the view that the liability of the directors cannot be determined without a trial, because they may well be exonerated depending on their state of knowledge, their personal skill and experience and whether, in the circumstances of this case, they had discharged their responsibility by properly delegating their duty to make full and fair disclosure to Alliance Investment Bank. I directed that a case management be held to settle the issues upon which *viva voce* testimony was to be received.

No Claim Against The Advisor Or Mercury

[98] I was of the view that Pinerains' counterclaim could not be sustained against either Mercury or Alliance Investment Bank.

[99] It was not in material dispute that Alliance Investment Bank was appointed by Apex Equity to act as the principal advisor and placement agent in connection with the proposed transaction. Alliance Investment Bank

would thus owe duties to Apex Equity. These duties arise in contract. It is also plausible that, as a financial advisor to Apex Equity, it would also owe fiduciary duties to Apex Equity.

[100] There clearly was no privity between Alliance Investment Bank and Pinerains regarding the role of the former in preparing the shareholders' circular, advising Apex Equity on the financial aspects of the proposed transaction or liaising with the regulatory authorities for the necessary approvals. Thus, Alliance Investment Bank could not have owed any duty in contract to Pinerains.

[101] Furthermore, any fiduciary duty on Alliance Investment Bank would have only been owed to Apex Equity, and not to individual shareholders in Apex Equity. For this reason, the counterclaim against Alliance Investment Bank was dismissed.

[102] The position of Mercury was one step further removed when compared to the position of Alliance Investment Bank. Mercury would not even have owed any duty to Apex Equity or to JF Apex, because it was a mere counterparty to the proposed transaction. For this reason, I was of view that the counterclaim could not be sustained against Mercury.

The Second EGM

[103] Following my decision declaring void the resolution passed at the extraordinary general meeting of 19 June 2019, Apex Equity proceeded to convene a fresh extraordinary general meeting on 18 November 2019. On 12 November, Pinerains sought an order from the court to direct the chairman of the extraordinary general meeting to adjourn the meeting pending the appointment by the Securities Commission Malaysia of an independent advisor pursuant to s. 218A of the Capital Markets and Services Act 2007. Pinerains also sought the appointment of an independent scrutineer to attend the meeting to oversee the voting process.

[104] I dismissed the application for an order directing the chairman of the meeting to adjourn the meeting. The reasons were as follows:

(i) the request from Pinerains to the Securities Commission to exercise its powers to appoint an independent advisor under s. 218A of the Capital Markets and Services Act 2007 presupposed that the proposed transaction had triggered the obligation to make a take-over offer, by the acquisition of control over a listed company. In this case, there has been no determination by the Commission that there has been an acquisition of control or that the transaction will result in the acquisition of control over Apex Equity. Absent such a determination, the powers of the Commission under s. 218A cannot be exercised; and

(ii) secondly and no less significant, the function of the independent advisor is to advise the shareholders other than the offeror and other than those shareholders who had sold their shares to the offeror in the transaction that triggered the mandatory offer obligation, on the fairness and reasonableness of the offer price in a take-over offer. The transaction that was under contemplation was not itself a take-over offer. Even if Pinerains was correct that the placees in the private placement exercise were parties acting in concert with Mercury (and I note in this regard that there was no direct evidence to this effect, merely inferences and suppositions), the obligation on Mercury and the parties acting in concert with it to undertake a mandatory take-over offer would only be triggered by the proposed transaction. It is only after the acquirer has obtained control that he will be placed under an obligation to make an offer to the remaining shareholders to buy them out at the same price per share at which he had acquired control. When this mandatory take-over offer is put before the shareholders, it is at this point that the law requires an independent advisor to be appointed by the target company to advise the remaining shareholders on the reasonableness and fairness of the price being offered. In other words, the request to the Commission by Pinerains for an independent advisor to be appointed was premature.

[105] Given the protracted nature of the dispute between the parties and the nature of the allegations that have been set out in the affidavits affirmed both in support of and in opposition to the main action, I considered that it would be in the interests of the general body of shareholders of Apex Equity for not only there to be an independent scrutineer, but a scrutineer whose independence was beyond reproach. For this reason, I directed that a new independent scrutineer be appointed by Apex Equity.

[106] Following this direction, Mr Steven Thiru was appointed by agreement between Apex Equity and Pinerains.

Endnotes:

1. The grounds for this decision is reported as *Concrete Parade Sdn Bhd v. Apex Equity Holdings Bhd & Ors* [2019] 1 LNS 1491; [2019] AMEJ 1182, [2019] MLJU 1097, [2019] MLRHU 1118
2. [2003] 2 CLJ 671, [2003] 3 AMR 500, [2003] 3 MLJ 81, [2003] 1 MLRH 322
3. 34 ACSR 261
4. [1891] 1 Ch 213
5. [2005] 6 CLJ 194, [2006] 3 AMR 398, [2006] 3 MLJ 140, [2006] 1 MLRA 489
6. [1934] 1 Ch 635

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7. [1990] BCLC 461
8. [2008] 8 CLJ 354, [2008] 4 AMR 344, [2008] 2 MLRH 317
9. 15 ACSR 590
10. [1991] 2 CLJ 1155; [1991] 2 CLJ (Rep) 525; [1990] 1 MLRH 106
B
11. [1989] 1 Ch 359 (CA)
12. [1915] 1 Ch 503 (CA)
13. (1985) 9 ACLR 956
C
14. [1917] AC 607
15. (1988) 14 ACLR 717
16. See para. 20 of Appendix 10B to the Main Market Listing Requirements of Bursa Malaysia
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